Supreme Court, U.S.
F I L E D
NOV 13 1995
CLERK

No. 95-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. KEARNS,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF TO REED SMITH SHAW & McCLAY'S OPPOSITION TO CERTIORARI

ROBERT W. KEARNS, PH.D.
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BEST AVAILABLE COPY

Reply to Reed Smith's

QUESTIONS PRESENTED FOR REVIEW

p. i: Reed Smith rejects the questions presented for review ... because they raise issues ... that are untimely or unsuitable to be decided by this honorable Court.

Reed Smith overlooked the fact that the civil action no. 82-70748 was continuing in time during the distribution-of Chrysler's-funds phase that followed the decision on certiorari by the Supreme Court.

See, Overview p. 1 Pet.. to learn the timeliness.

Both Petitioner, Robert W. Kearns' ("Dr. Kearns'") Motion-

> to Yet Allow Evidence to Grant Dr. Kearns Equitable Relief to Bring Judgment into Accord with the USA's Postion Under the General Agreement of Tariffs and Trade in the Uruguay Round ("GATT"), Docket Event #652 entered on 16 June 1993-

and the District Court's ORDER — no jurisdiction in the premises — were entered before Dr. Kearns' Notice of Appeal was filed with a Court of Appeals. Dr. Kearns could not appeal said Order, because it was not a final order — both the U.S. Congress and the President were still considering whether to sign the GATT Treaty. That Order remained non-final until 8 June 1995 when the patent law portion of the GATT Treaty became effective U.S. law.

Dr. Kearns pursuit of equitable relief under 35 U.S. Code § 283 has become, next to saving his soul, the dominant goal of his life after he first read *Roche Prods., Inc.* v *Bolar Pharmaceutical Co.*, 733 F.2d 858, 221 U.S.P.Q. 937 (Fed. Cir. 1984) and came to understand that the public interest in the U.S. patent law was not fulfilled in a 35 U.S. Code § 281 'remedy' civil action,— as said 'remedy' was to the patentee — not the public —, *unless* equitable relief under 35 U.S. Code § 283 was recognized by the Supreme Court to be mandatory to the patentee.

Damages alone, under 35 U.S. Code § 284, are nothing more than a compulsory license that defeats the 'remedy.'

That compulsory license is unConstitutional whether it results from a formal infringement trial proceeding, as here, or the authorization is direct. For money alone, through a 'remedy' trial process, Chrysler *et al.* has been given the authority to utilize the patent property of Dr. Kearns. That is wrong! Art. I § 8 cl 8 has been perverted. The public interest was denied. The inventor-manufacturer was denied. Our trade and economy were denied. Wet-weather driving safety was not enhanced by the sales of the 35 U.S. Code § 112 'best mode' disclosure.

Moreover, the USA Judicial Branch enforces a single time period of 17 years which is unConstitutional as the law allows multiple time periods of exclusivity — that need not start with the first day of the grant. In the case of this Petition, Ford and Chrysler were infringing Dr. Kearns' patents on the first day of the grant. How is it possible to give the inventor an exclusive right when others are infringing ["using", *see*, *Roche*, *supra*] it?

It is a blessing that the GATT Treaty is liberally sprinkled with the phrase, "unless this would be contrary to existing constitutional requirements." That presents an opportunity for the Justices to 'remedy' our export trade deficit now, but only now, as the GATT Treaty is new and a denial of the Petition will accept our diminished position as being in conformity with the existing words of our Constitution.

Good results are fairly contained in the questions presented. These are important and special reasons for granting certiorari.

Reply to Reed Smith's
PARTIES

p. ii & Cover: Reed Smith was counsel to Petitioner in the liability portion of a patent infringement action brought by him against the Chrysler Corporation ... .

In accord with the intent of Supreme Court Rule 14.1.(b) (and the admonition of the Supreme Court admittance Clerk) Dr. Kearns has corrected the cover hereon to list only the parties to these proceedings. Thus, KLH, Professional Corporation; Arnold, White and Durkee, Corporation and Reed Smith Shaw & McClay, P.C. have been removed from the cover hereon. The proceedings in the Court of Appeals for the Federal Circuit ("CAFC") occurred without their credentials as parties being checked by the Circuit Judge. Using motions —

> "AWD and Reed Smith seek dismissal on the ground that Kearns failed to serve them with his motion for reconsideration and, therefore, it was not a timely Rule 59(e) motion that tolled the time for appeal."[Pet. A-10]

was without legitimacy. See, Pet. p. 17 (reproduced for convenience):

"The Florida Court has questioned the dismissed (RSSM) or fired (AW&DC) lawyer's right to assert a motion in the case they have left. Like the lawyers in *Scuteri, et al., supra*, RSSM and AW&DC lawyers

> "sole basis for appearing in this case is that it represented Plaintiffs several years ago. There is no question that (they) are not a party." "

The Rules of the Fed. R. Civ. P., including **Rule 5. Service and Filing of Pleadings and Other Papers**, apply to parties. Thus, Dr. Kearns' conduct in CAFC Appeal No. 95-1016 [Pet. A-9] of serving Chrysler Corporation (as American Motors Corp. is now owned by Chrysler Corp.) was in accord with the Fed. R. Civ. P. Rules. Dr. Kearns' not serving non-parties is not a proper basis for employing *res juricata* of phases of this

Petition for Writ of Certiorari.

The legal foundation for CAFC O R D E R in Appeal No. 95-1334 dated 28 June 1995 [Pet. A-13 & A-15] is faulty from their non-party-in-the-action status. In view of the judicial events occurring in deference to AW&DC's and Reed Smith's non-party-status urgings upon the CAFC, Dr. Kearns' *pro se* status makes his number (8) Question Presented most relevant to the Constitutional treatment of inventors by the Judiciary. Presently, *pro se* inventors are only entitled to have their pleadings liberally construed. *Haines* v. *Kerner*, 404 U.S. 519 (1972).

p. ii: "Dr. Kearns has also fought efforts by Reed Smith and others, including Arnold, White and Durkee ("AW&D") to collect fees and expenses associated with these lawsuits. Dr. Kearns is currently proceeding *pro se*."

It is true. It is true that Petitioner Dr. Kearns is a Professional Engineer Registered in both Mechanical and Electrical Engineer and inventor of 29 U.S. patents and granted 'many' foreign patents throughout the western world is appearing *pro se* under 28 U.S. Code § 1654. It is also true, that when William O. Bittman, *et al.* filed a Complaint against Dr. Kearns in the U.S. District Court for Columbia in Washington, Dr. Kearns defended himself and his honor. Moreover, that dispute is currently, Civil No. 2:93-CV-74013, a jury trial, in which Dr. Kearns has a counterclaim against Reed Smith and is to proceed in the Detroit U.S. District Court presided over by District Judge Cohn.

The Justices of the Supreme Court know that the Constitution Art. I § 8 cl 8 is directed toward 'promoting' science and the useful arts and that is not happening when a District Judge 'walks away from a jury trial in which Dr. Kearns has a counterclaim' and shovels Chrysler money to Reed Smith and others.

What troubles Dr. Kearns as well about this, is that the Court of Appeals for the Federal Circuit ("CAFC")[1], on a record consisting of but a few pieces of paper, has so far sanctioned, departures and the CAFC itself departed from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is in order, if the USA Government that issues patents is to pay any attention to Galileo's second remark[2], that if he were granted and protected by a privilege:

> "I shall the more attentively apply myself to new inventions for universal benefit."

In 1594, the Doge, on behalf of the government, used the expression "privilege" as the Venetian name for a patent.

In short, Reed Smith is saying they are happy to receive $3 million in by-passing court procedures when they have no standing, did not intervene, are not parties, abandoned their client who agreed to Judge Cohn's proffer of placing with the Court $500,000 to assure Reed Smith of payment to complete the damage phase of the Chrysler trial. But they voluntarily withdrew and went home.

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[1] remember, the CAFC is now the USA's only Court of Appeals for U.S. patents in the nation. (Absolute power ... .)

[2] *KETTERING AWARD ADDRESS* by Circuit Judge Giles S. Rich, republished in the Journal of the Patent Office Society, Vol. 46, p. 855 (1964). {Dr. Kearns filed his first Intermittent Windshield Wiper System patent in 1964.}

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[1] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189.

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Martindell v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2d Cir. 1979) and cases cited therein.	8
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Civil Actions:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM O. BITTMAN, et al.,]
Plaintiffs,]
Counterclaim Defendants,]
v] Civil Action No.
] 2:93-CV-74013
ROBERT W. KEARNS,] Honorable Avern Cohn
Defendant,]
Counterclaim Plaintiff,]
v]
REED SMITH, et al.,]
Counterclaim Defendant.]
] 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICK A. KEENAN;]
DANIEL J. HENRY, JR.;]
and KLH, P.C.,]
a Michigan Professional Corporation]
Plaintiffs,] Case No.94-74753
vs.] Judge Taylor
ROBERT W. KEARNS,]
Defendant.]

Presently, in CAFC Appeal No. 95-1481. 6

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Fed. R. Civ. P.

defenses under Rule 12

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the leader be made by motion:
(1) lack of jurisdiction over the subject matter,
(2) lack or jurisdiction over the person,
(3) improper venue,
(4) insufficiency of process;
(5) insufficiency of service of process,
(6) failure to state a claim upon which relief can be granted,
(7) failure to join a party under Rule 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the leading are presented to and not excluded by the court, the motion shall be treated as one ;for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. 8

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Rule 54. Judgments; Costs

(a) Definition; Form.
(b) Judgment Upon Multiple Claims or Involving Multiple Parties.
(c) Demand for Judgment.
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Rule 59. New Trials; Amendment of Judgments

(a) Grounds.
(b) Time of Motion.
(c) Time for Serving Affidavits.
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(b) Mistakes; Inadvertence; Excusable Neglect; Newly Di8scovered Evidence; Fraud, etc. 7

Laws:

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 8

"The Congress shall have the power:

"To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 10

Article III

Section. 1.
Section. 2.
Section. 3. 7

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Laws (Con't.):

Public interest in the patent law: 2

In early times:

Pennock v. *Dialogue*,
2 Pet. 1;

Kendall v. *Winsor*,
21 How. 322, 329;

Adams v. *Burke*,
17 Wall. 453;

Motion-Picture Co. v.
Universal Film Co.
243 U.S. pp. 510-511;

Morton Salt Co. v. *G.S. Suppiger Co.*,
314 U.S. 488, 493;

United States v. *Masonite Corp.*,
316 U.S. 265, 278

... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ..." the Supreme Court extols that the public interest in the patent law is dominant. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665.

In the '80s,

The Supreme Court exclaims the public interest should be accorded equal weight in deciding patent cases. *Dawson Chem. Co.* v. *Rohn and Haas Co.*, 448 U.S. 176, 221.

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Statutes:

28 U.S. Code:

§ 636. Jurisdiction, powers, and temporary assignment
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§ 1291. Final decisions of district courts
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States, ... 3

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit
(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
(1) of an appeal from a final decision of a district court of the United States ... 2

§ 1332. Diversity of citizenship; amount in controversy; costs.
(a) The district courts shall have original jurisdiction of all civil actions; where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
(1) citizens of different States; 6

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Statutes:

35 U.S. Code:

§ 112. Specification

The specificaion shall contain a written description of the invention ..., and shall set forth the best mode contemplated by the inventor of carrying out his/her invention.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification and drawings for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

(July 19, 1952, c. 950, section 1, 66 Stat. 804) 10

§ 281. Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent.

July 19, 1952, c. 950, § 1, 66 Stat. 812. 1, 3, 10

§ 283. Injunction.[1]

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 1

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[1] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189, 26 L.Ed. 975.

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Statutes (Con't.):

35 U.S. Code:

§ 284. Damages.

(a) Upon a finding for the claimant the court shall award the claimant damages

1. adequate to compensate for the infringement,
2. but in no event less than a reasonable royalty for the use made of the invention by the infringer,
3. together with interest and costs as fixed by the court.

(b) When the damages are not found by a jury, the court shall assess them.

(c) In either event the court may increase the damages up to three times the amount found or assessed. 2, 4

Newspapers:

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The Other Deficit, an Editorial, The Washington Post, 21 August 1995. 3

Speeches:

Galileo's remarks[2]

KETTERING AWARD ADDRESS by Circuit Judge Giles S. Rich, republished in the Journal of the Patent Office Society, Vol. 46, p. 855 (1964). 4

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[2] {Dr. Kearns filed his first Intermittent Windshield Wiper System patent in 1964.}

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Treaties:

General Agreement on Tariffs and Trade ("GATT")

(proposed)

On 20 December 1991, Arthur Dunkel, GATT Director General & the Chairman of the Trade Negotiations Committee tabled the document, a Protocol, titled, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" [MTN-TNC/S/FA Dec. 20, 1991] The document purports to be "a concrete and comprehensive representation of the final global package of the results of the Uruguay Round." *See*, TRADE-BASED APPROACHES to the PROTECTION of INTELLECTUAL PROPERTY by Edward Slavko Yambrusic Oceana Publications, Inc. (1992)
New York * London * Rome 6

(legislated)

URUGUAY ROUND TRADE AGREEMENTS,
TEXTS OF AGREEMENTS,
IMPLEMENTING BILL,
STATEMENT OF ADMINISTRATIVE ACTION,
and
REQUIRED SUPPORTING STATEMENTS
Message from the President of the United States
September 27, 1994.—Message and accompanying papers referred to the Committees of Ways and Means, Agriculture, Educatin and Labor, Energy and Commerce, Foreign Affairs, Government Operations, the Judiciary, and Rules and ordered to be printed.
House Document 103-316, Vol. 1
H.R. 5110 103d Congress, 2d Session
Available from Government Printing Office
(Sept.,1994) 6

Dr. Kearns' Replies to Reed Smith's STATEMENT OF THE CASE

p. 1: Dr. Kearns' latest petition does not present any issues which can be resolved by this Court at the current procedural stage of the litigation. A review of this procedural history demonstrates that this Petition for Writ of Certiorari should be denied.

In the Overview on p. 1 of Dr. Kearns' STATEMENT OF THE CASE, the scene of Docket Event #652 is: that Judge Cohn has consistently denied, both in *Kearns* v. *Ford* and thus far in *Kearns* v. *Chrysler Corp. and American Motors Corp.* an evidentiary hearing at which Dr. Kearns can present evidence of his— *and the public's* —entitlement to equitable relief under 35 U.S. Code § 283[3]; the window of opportunity is still open at that time as no one has yet appealed the Final Judgment. It is then that Dr. Kearns moves the Court, "to yet allow evidence [to be heard] to grant Dr. Kearns equitable Relief to bring the Final Judgment into accord with the USA's [present] Position in the Uruguay Round of discussions under the proposed Treaty of General Agreement on Tariffs and Trade ("GATT")." Dr. Kearns knew[4] of GATT early.

Judge Cohn issued an ORDER [Docket Event #653] that he had no jurisdiction on the premises of Dr. Kearns' Motion.

Dr. Kearns could not appeal that ORDER as it pertained to a 35 U.S. Code § 281 patent case and the CAFC's authority to review the District Court's ORDER under 28 U.S. Code §

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[3] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189.

[4] On 20 December 1991, Arthur Dunkel, GATT Director General & the Chairman of the Trade Negotiations Committee tabled the document, a Protocol, titled, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" [MTN-TNC/S/FA Dec. 20, 1991] The document purports to be "a concrete and comprehensive representation of the final global package of the results of the Uruguay Round." [*Id.*] And, Dr. Kearns studied a copy he obtained.

1295 was limited in (a)(1) to "final decisions of a district court of the United States" and a treaty draft in 1993 is not 'final.' Nor could Dr. Kearns appeal in 1994 as the GATT Treaty was not 'final.'

Certiorari was denied for CAFC Appeals Nos. 93-1450,-1470 on 17 March 1995. The record shows Chrysler then sought to this date to distribute Chrysler funds deposited with the Court by continuing civil no. 82-70748. On 8 June 1995, the GATT patent law became effective USA law[5].

Dr. Kearns was the first inventor-lawyer(?) to question the Constitutionality of the GATT Treaty provisions under Art. I § 8 cl 8 in Docket Event #652 entered on 16 June 1993.

Moreover, it is to the benefit: of the public interest in the patent law[6]; of the economy and foreign trade of the USA[7];

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[5] *See*, GATT Treaty is now effective U.S. Law on p. 3 of Dr. Kearns' Petition for Writ of Certiorari and the arguments made therein. CAFC Appeal No. 95-1334 Appendix Vol. 2 contains documents beginning: at A4, Dr. Kearns' GATT unConstitutionality arguments; at A5, that money alone to the inventor under 35 U.S. Code § 284 is in violation of Congress' actions; at A6, The Patent System and the Modern Economy; at A 21 transcript of Bittman (Reed Smith) voluntary withdrawal; at A 22 & A 23 events leading to AW&DC discharge for not representing Dr. Kearns (and the public) under the patent laws; at A 33 the fax of Mr. Henry withdrawing KLH, P.C.. Appendix Volume 3 contains documents of Kearns *Engineers* manufacturing abilites and exporting experience-just thumb through.

[6] In early times, {*Pennock* v. *Dialogue*, 2 Pet. 1; *Kendall* v. *Winsor*, 21 How. 322, 329; *Adams* v. *Burke*, 17 Wall. 453; *Motion-Picture Co.* v. *Universal Film Co.* 243 U.S. pp. 510-511; *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 493; *United States* v. *Masonite Corp.*, 316 U.S. 265, 278 ... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ..."} the Supreme Court extols that the public interest in the patent law is dominant. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665.

In the '80s, the Supreme Court exclaims the public interest should be accorded equal weight in deciding patent cases. *Dawson Chem. Co.* v. *Rohn and Haas Co.*, 448 U.S. 176, 221.

for the Supreme Court to address the problems appealed by Dr. Kearns under 35 U.S. Code § 281 that is supposed to provide a 'remedy' for patent infringement.

Be aware Dr. Kearns hasn't taken any of the damages as 'money is not adequate' in keeping with Chisum, REMEDIES FOR PATENT INFRINGEMENT, page 397: "The possibility of post-expiration equitable relief was raised but not resolved in *Roche Prods., Inc.* v *Bolar Pharmaceutical Co.*, 733 F.2d 858, 221 U.S.P.Q. 937 (Fed. Cir. 1984).

p. 2: After the Chrysler verdict [*by the Supreme Court*!], both AW&D and Reed Smith filed separate claims against Dr. Kearns to recover attorneys' fees and expenses incidental to their respective representations.

An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Jewelers Vigilance Committee, Inc.* v. *Ullenberg Corp.*, 853 F.2d 888 (Fed. Cir. 1988) citing at n. 3 *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948) (quoted with approval in *Northern Helex Co.* v. *United States*, 634 F.2d 557, 560, 225 Ct.Cl. 194 (1980). Under 28 U.S.C. § 1291, the Court of Appeals has jurisdiction only from *final* decisions of the United States District Courts. A Judgment is final for purposes of appeal when it terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. *Donovan* v. *Hayden Stone, Inc.*, 434 F.2d 619, 620 (6th Cir., 1970) citing *Heike* v. *United States*, 217 U.S. 423, 429, 30

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[7] *Quarterly Trade Deficit Hits 8-Year High*, by John M. Berry, The Washington Post, 18 August 1995; *The Other Deficit*, an Editorial, The Washington Post, 21 August 1995. See, CAFC Appeal No. 95-1334 Appendix Vol. Two (of 3), p. A-37 & A-38, respectively — "This country was the world's largest creditor 15 years ago ... since then the U.S. has become the world's largest debtor...";

S.Ct. 539, 54 L.ed. 821; *St. Louis, Iron Mountain & S. R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28, 2 S.Ct. 6, 27 L.Ed. 638; *City of Louisa* v. *Levi*, 140 F.2d 512 (6th Cir.).

Both the Supersedeas Bond and the Final Judgment affirmed by the Court of Appeals for the Federal Circuit with certiorari denied by the Supreme Court require Chrysler Corp. to pay the full amount of § 284 Damages to Robert W. Kearns.

Although the claims in Chrysler Corp.'s Cross-Complaint and Third Party Complaint ... were pending for years, nothing affirmative toward granting them was stated in the final judgment. Clearly, Chrysler Corp. went beyond proper bounds in including Reed Smith Shaw & McClay in their continuing civil action 82-70748. Reed Smith Shaw & McClay filed a separate action against Dr. Kearns in the U.S. District Court for the District of Columbia, Civil No. 92-0501 before Judge Norma Holloway Johnson in which Dr. Kearns is allowed to present counter-claims before a jury. That case was transferred and is now 2:93-cv-74013 before Judge Avern Cohn. Those counter-claims have not been adjudicated. Fed. R. Civ. P. Rule 54

The Order on Applications for Attorney Fees of 26 August 1994 [Resp. RS App. 1a] was not yet an appealable order and is not a judgment which could then be enforced.

For the following, see Overview at Pet. p. 1.

On 16 October 1991 a claim by claimant Phyllis Kearns in 2:82-cv-70748 was entered (docket event #171 in *Kearns* v. *Chrysler Corp.*, Civil No. 70748). On 23 Dec. '91 a Motion by Reed Smith Shaw & McClay to impose a charging lien with brief was filed (docket event #260 in *Kearns* v. *Chrysler*, Civil No. 70748). On 28 May '92 a Notice by William Bittman of attorneys' charging lien was entered (docket event #465 in *Kearns* v. *Chrysler Corp.*, Civil No. 82-70748). On 8 June '92 a Motion by Arnold, White & Durkee Corp. to impose a

charging lien, with exhibit was filed (docket event #478 in *Kearns* v. *Chrysler Corp.*, Civil No. 82-70748). On 29 October 1992 a Final Judgment by Judge Cohn was filed[8,9] which in ¶ 6 dismissed with prejudice the claims, prayers, requests and motions encompassing the claim of claimant Phyllis Kearns, the prayers, requests and motions for charging liens of Mr. Bittman *et al.*, Reed Smith Shaw and McClay, and Arnold White & Durkee Corp. (docket event #571 in *Kearns* v. *Chrysler*, Civil No. 82-70748). On 6 July 1993 Arnold, White & Durkee Corp. filed a Notice of Appeal (Docket event #662 in *Kearns* v. *Chrysler Corp.*, Civil No. 82-70748 which became appeal No. 93-1468). On 22 September 1993 (Federal Circuit Docket event #10) Arnold, White & Durkee Corp.'s Appeal was dismissed by Federal Circuit Judge Archer. Claimant Phyllis Kearns and movant Mr. Bittman of Reed Smith Shaw & McClay did not appeal the dismissals with prejudice of their claim and prayers, request, motion, respectively. The above acts mean that the claim of Phyllis Kearns and the prayers, requests and motions for charging liens of Mr. Bittman, Reed Smith Shaw & McClay, and, Arnold, White &

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[8] A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and never ought to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision. *Fayerweather* v. *Ritch*, 195 U.S. 276.

[9] Upon collateral attack the validity of a judgment cannot be determined except upon the record. (citing *Stockyards Nat. Bank* v. *Presnall*, 109 Tex. 32, 194 S.W. 384.) Unless the record negatives the existence of facts that are essential to the court's jurisdiction, the law conclusively presumes upon collateral attack that those facts were established by the evidence. *Crawford* v. *Mc Donald*, 88 Tex. 626, 630-632, 33 S.W. 325; *Templeton* v. *Ferguson*, 89 Tex. 47, 33 S.W. 329; *Moore* v. *Hanscom*, 101 Tex. 293, 106 S.W. 876 ...) in *Security Trust Co. of Austin* v. *Lipscomb County*, 180 S.W.2d 151, 156 (Supreme Court of Texas, 1944).

Durkee Corp. were dismissed by the CAFC and are now subject beyond 22 September 1993 to *res judicata*. The supervision of the Supreme Court is needed here.

The claim of KLH, P.C., *et al.*, has its origin in providing tutoring services to Dr. Kearns arising in *Kearns* v. *Chrysler Corporation*, 82-cv-70748. The domiciles of the litigants are diverse. KLH, *et al.* seek more than $50,000 from Dr. Kearns. As such the U.S. District Courts have original jurisdiction under 28 U.S.C. § 1332(a)(1). The Wayne County Circuit Court civil action was removed on 11 October 1994. There was no motion for remand far beyond the 30-day statutory time. Plaintiffs not moving to remand within statutory period are deemed to have waived any nonjurisdictional ground for remand. *Howard* v. *Northwest Airlines, Inc.*, 793 F.Supp. 129 (S.D. Tex. 1992). Personal injury plaintiffs' failure to initiate service of motion to remand within required 30-day period waived their objections to alleged untimely and improvident removal of case. *Elder* v. *Wal-Mart Stores, Inc.*, 751 F.Supp. 639 (E.D. La. 1990). Plaintiffs waived procedural defect present in defendant's removal petition of removing action ... where plaintiff did not meet statutory deadline requiring that motion to remand be brought within 30 days of notice of removal. *Leidolf by Warshafsky* v. *Eli Lilly and Co., Inc.*, 728 F.Supp. 1383 (E.D.Wis. 1990). The *KLH, P.C., et al.* v. *Kearns* civil action case was a jury trial assigned to U.S. District Judge Taylor no. 94-74753 in the U.S. District Court for the Eastern District of Michigan Southern Division when Chrysler continued 82-70748.

In summary, were the District Court to have subject matter as well as personal jurisdiction of the defendants listed in Chrysler Corp.'s Cross-Complaint and Third Party Complaint for Interpleader, Declaratory and Injunctive Relief there is still no adverse demands to be made on Chrysler Corp. at this time

as each defendant has had action before the court or have suits pending in distinct jury trials awaiting judgment. Yet the District Court distributed $10.7 million! Supervision is needed.

Dr. Kearns also submits that neither AW&DC or RSSM had standing in which to bring their respective motions and applications. Standing is a limitation on judicial power as well as the capacity of federal courts to receive jurisdiction. Without standing there is no case or controversy and no subject matter jurisdiction under Article III of the United States Constitution. Chief Justice Marshall has held that

> "judicial power is capable of acting only when the subject is submitted in a case, and a case only arises when a party asserts his rights in a form prescribed by law. *Osborn* v. *U.S. Bank*, 9 Wheat (22 U.S.) 738, 819.

The Florida Court has questioned the dismissed or fired lawyers' right to assert a motion in the case they have left. Like the lawyers in *Scuteri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D.Fla. 1993) the Reed Smith and AWD's

> "sole basis for appearing in this case is that it represented Plaintiffs several years ago. There is no question that (they) are not a party."

Likewise the Eleventh Circuit has held that a non-party lacks standing to bring a Rule 60(b) motion. *Kem Manufacturing Corp.* v. *Wilder*, 817 F.2d 1517 (11th Cir. 1987). Since Rule 59 refers only to parties, and is thus more restrictive than Rule 60, it is logical to conclude that the same analysis applies. Accordingly, non-parties would not have standing under any other provision such as Rule 7(a) which provides for motions. In short, the Federal Rules refer to parties and RSSM and AW&DC and KLM, P.C. et al. do not qualify as parties.

"[M]ovants are non-parties since they have failed to move for leave to intervene in this proceeding for purposes of lifting the protective order thus they have no standing to bring this motion." *See, Martindell*, v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2d Cir. 1979) and cases cited therein.

It is generally viewed that motion can only be made by a party or record. *Gibbs* v. *Ewing*, 94 Fla. 236, 113 So. 730. The procedure allowed by the District Court resulted in a situation where AW&DC and RSSM and others were allowed to "plead" without giving Dr. Kearns an opportunity to Answer the 'Complaint' and assert his defenses under Rule 12. By seeking relief outside the framework of the Federal Rules, those seeking funds were able to avoid the requirements of the Fed.R.Civ.P.

The procedure followed also enabled the attorneys to proceed avoiding the local rules. For example, the docket sheets reflect that neither attorneys filed new appearances in the case or moved to proceed *pro hac vice* in the Michigan Federal Court system. The attorneys first appearance was no longer viable.

Although there is no specific procedure devised under Michigan law, established Michigan Law demonstrates an attorney who elects to seek relief by imposition of a charging lien must proceed by intervention. *See, Kysor Industrial Corp.* v. *D.M. Liquidating Co., et al.*, 161 N.W.2d 520 (Mich. App. 1975) (Law firm Colista, Baum & Domonkos identified as "Intervening Defendants appellees"), or bring a separate action. *Rubel* v. *Brimacombe & Schlecte*, 86 B.R. (E.D. Mich. 1988). Thus, in the cases located which dealt with or recognized an attorney's charging lien, the attorney was identified as an intervenor or party.

Dr. Kearns did not consent to have the matter tried before a magistrate and the district court has no authority to refer the matter to a magistrate under Michigan law, the Federal Rules or under 28 U.S. Code § 636. Federal law is higher than state law. Federal law is the law of the state where the services were performed. *Chrysler* was performed in the state of Michigan. Michigan state law is common law. "Federal courts recognize only those liens on a cause of action in behalf of an attorney which are under local law." *Bazzano* v. *Rockwell*

Intern. Corp., 564 F.Supp. 121 (E.D. Mo., 1983). "Under Michigan law, no statute governs attorney liens so they rest entirely upon common law. ... . An attorney's lien on a judgment is not recognized at common law unless declared by statute, but the lien on the papers is." Cited with approval. AW&DC sent Dr. Kearns only copies of the papers. AW&DC exercised their retaining lien *Ambrose* v. *Detroit Edison Co.*, 237 N.W.2d 520, a Michigan case which was before the Court of Appeals of Michigan p. 520:

2. Attorney and Client (key) 186

Attorney who withdraws from suit without cause loses his inchoate right to lien on ultimate recovery.

In this state (Michigan) there can be no question but an attorney between himself and his client has a lien upon a judgment obtained through the attorney's efforts for services and disbursements in a particular case. *Shank* v. *Lippman*, 249 Mich. 22, 227 N.W. 710 as cited with approval in *Framm* v. *Kelley, Sheriff, et al.*, 256 N.W. 552 (Supreme Court of Michigan, Oct. 1, '34, as cited with approval in *Bruce* v. *U.S.*, v. *United States*, 127 F.Supp. 858 (D.C. E.D.Mich. N.D.,1955).

Attorney's lien cannot attach until some recovery is had for client (*Smith-Hurd Rev.* St. Ill. 1929, c. 13, § 14).

Here, Mr. Bittman *et al.* and Reed Smith withdrew before they obtained a truly-final judgment in *Kearns* v. *Chrysler, et al.* and thus secured no fruit upon which to attach their charging lien, either. "If the attorney's work is sterile and produces no fruit from his labor, then he has no lien." *Midvale Motors, Inc.* v *Saunders*, 422 P.2d 938, 940 Supreme Court of Utah 1968. Without obtaining said fruits, Reed Smith is not entitled to funds from Judge Cohn's disbursement of Chrysler's money.

Dr. Kearns Replies to Reed Smith's ARGUMENT

The various "questions" raised by Dr. Kearns' latest Petition for Writ of Certiorari

relate to matters decided in all three of the procedural stages outlined in the previous section.

Dr. Kearns' 1st Question includes the fact that the first 35 U.S.C. § 281 civil action he filed for a 'remedy' for patent infringement did not come to trial at all for 18 years while the Judiciary enforce a single time period routine-life of 17 years.

Dr. Kearns' 2nd Question is a Constitutional challenge as explained in his Petition.

Scholars claim the specific mechanism for all people to attain equal rights and opportunites is not in the Constitution. It is Const. Art. I § 8 cl 8 if enforced by the Judicial Branch. That news could change the study habits of our youth. To find Article 46 proportional here would increase exports +4.8%.

The 4th Question's "from the date of this grant" is not in the words of 35 U.S. Code § 154 and the word term therein refers to a quantity of time that does not state when it begins. An additional word is required to state when a term begins, *e.g.*, fall term, spring term. That additional word is not present.

Dr. Kearns' 5th Question is viable to this Petition since the District Court raised the stakes to the inventor in this Petition by requiring the infringement to be found willful by the jury.

The 6th Question is viable to this Petition since if this very same case had been filed in the 11th Circuit the result would have been in Dr. Kearns' favor — an opposite end-result.

The 7th Question asks if an invention is infringed by 43 defendants is the *pro se* inventor of Intermittent Windshield Wiper Systems to be punished under the Fed. R. Civ. P. for burdening the Judiciary? Do we stop successful inventions or stop industry from stealing or stop the Judiciary from burden?

The 8th & 9th Question were shown viable, *supra*..

Dr. Kearns Replies to Reed Smith's CONCLUSION

Obtain the publics' interest — protect jobs — grant certiorari.